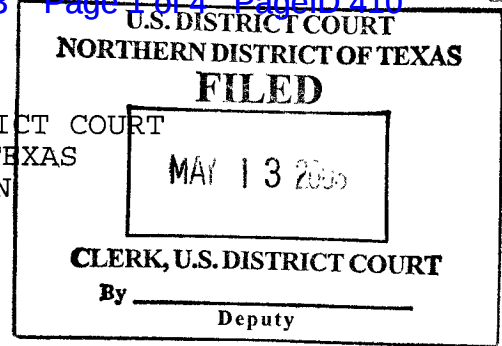


IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



RONALD F. SARGENT,
Plaintiff,

vs.

VITALITY FOOD SERVICE, INC.,
ET AL.

Defendants.

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NO. 4:02-CV-018-A

O R D E R

Came on for consideration the motion of defendants Vitality Food Service, Inc. ("VFS"), and Pasco Beverage Company ("PBC") for summary judgment. Plaintiff, Ronald F. Sargent ("Sargent"), has not filed any opposition to the motion.¹ The court, after having reviewed the motion, supporting brief, the record, the summary judgment evidence, and applicable authorities, concludes that the motion should be granted.

Sargent alleges in his second amended complaint that:² He is the owner of 100% of the issued and outstanding shares of

¹ By order signed April 23, 2003, the court extended the deadline for Sargent to file a response until 4:30 p.m. on May 9, 2003.

² The court has previously dismissed Sargent's claims against three of the five defendants Sargent originally named in his state-court petition. The original defendants were: VFS; Vitality Beverages, Inc. ("VBI"); PBC; Caxton-Iseman Capital, Inc. ("CIC"); and Engles, Urso & Follmer ("EUF"). The court dismissed with prejudice Sargent's claims against EUF by final judgment signed June 5, 2002; and, the court dismissed without prejudice Sargent's claims against CIC and VBI by final judgment signed June 11, 2002. The Fifth Circuit affirmed the court's judgments. See Sargent v. Vitality Food Service, Inc., No. 02-10799, slip op. (5th Cir. Mar. 7, 2003).

Dispenser Services of Texas, Inc. ("DST"), and Dispenser Services of Houston, Inc. ("DSH"). In late 1999 and early 2000, Sargent was involved in negotiations with VFS to sell DST and DSH. On January 19, 2000, a deal was finalized with the following terms:

. . . . (1) that the purchase price would be \$6,000,000; (2) Sargent would be responsible for debt of the business up to \$1,000,000, yielding a net before tax price of \$5,000,000; and (3) applying a capital gains tax rate of 20%, Sargent would receive a walk away amount of \$4,000,000. To obtain this tax rate, the deal needed to be structured as a stock deal without reservation to Defendants of an IRC § 338 election. . . . A stock purchase thus was agreed upon between Sargent and VFS. The parties agreed that the final dollar amount would be confirmed by January 24, 2000, so that it could be announced at a VFS board meeting on January 25, 2000. . . [T]he deal was celebrated at a VFS dinner meeting that was held on the evening of January 24, 2001.

2d Am. Compl. ¶ 15. VFS refused to honor the agreement, and then terminated supply contracts with DST and DSH, "the obvious intention [of which] was to destroy Sargent's business and begin selling directly to the customers (and purchasing from the various other suppliers) that Sargent had introduced to VFS and to whom Defendants had told that an agreement had been reached with Sargent." Id. ¶ 19. Defendants, armed with "the detailed and intimate information they received as part of VFS' supposedly completed purchase of Sargent's businesses," have since sought to take DST and DSH from Sargent for nothing. Id. ¶ 20.

Sargent asserts four grounds of recovery in his second amended complaint: breach of contract; fraud; estoppel; and civil conspiracy. Id. ¶¶ 21-30. By way of the first three grounds, Sargent targets the actions of VFS; as for the final

ground, he alleges that VFS conspired with all other defendants (the only other remaining defendant is PBC, see supra n.2) against Sargent. In effect, VFS and PBC maintain in their motion that there is no evidence to support any of Sargent's theories of liability against them. Br. to Mot. at 3-4. The court agrees.

Sargent's breach of contract claim fails because there is no evidence of a valid contract between Sargent and VFS. See, e.g., Southwell v. Univ. of the Incarnate Word, 974 S.W.2d 351, 354-55 (Tex. App.--San Antonio 1998, pet. denied). The fraud cause of action fails because there is no evidence that VFS made a promise of future performance, or that VFS intended to breach such a promise. See, e.g., Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 47-48 (Tex. 1998); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434-35 (Tex. 1986). The estoppel claim fails because there is no evidence VFS promised Sargent it would purchase DST and DSH. See, e.g., English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983). Finally, summary judgment is proper as to Sargent's civil conspiracy claim because VFS is not liable on an underlying tort; and, there is no evidence that PBC was substantially involved in the complained-of actions, or that VFS conspired with PBC to accomplish an unlawful purpose or a lawful purpose by unlawful means. See, e.g., Ins. Co. of N. Am. v. Morris, 981 S.W.2d 667, 675 (Tex. 1998); Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996).

In sum, the summary judgment evidence that VFS and PBC have adduced amply support the granting of their motion for summary

judgment. Sargent, by failing to respond to the motion, has presented no evidence to rebut VFS and PBC's contentions, or to suggest that there exists a genuine issue of material fact as to any of Sargent's claims against VFS and PBC.

Therefore,

The court ORDERS that VFS and PBC's motion for summary judgment be, and is hereby, granted.

The court FURTHER ORDERS that Sargent recover nothing from VFS and PBC, and that all of Sargent's claims and causes of action against VFS and PBC be, and are hereby, dismissed with prejudice.

SIGNED May 13, 2003.



JOHN MCBRYDE
United States District Judge